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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-362

INTERCOUNTY CONSTRUCTION CORP., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

NOAH C.A. WALTER, Deputy Commissioner,
U.S. Department of Labor,
Bureau of Employees Compensation,
and

MARY JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Bureau of Employees Compensation,

and

MARY JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Intercounty Construction Corporation and Hartford Accident & Indemnity Company pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 3, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (1a-12a) as does the opinion rendered by the U.S. District Court for the District of Columbia. (13a)

JURISDICTION

The District Court had jurisdiction under 33 U.S.C. §921. The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 3, 1974, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

When more than one year has elapsed between the date of last compensation payment and assertion of a claim for additional compensation under the Longshoremen's and Harbor Worker's Compensation Act, as made applicable to the District of Columbia, is the employee's claim for additional compensation barred by the 1-year statute of limitations provisions of the Act?

STATUTES INVOLVED

United States Code, Title 33:

§913. Time for filing of claims

(a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall

be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) of this section failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee

under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

March 4, 1927, c. 509, §13,44 Stat. 1432.

§921. Review of compensation orders

* * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court

and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

§922. Modification of awards

Upon his own initiative, or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

March 4, 1927, c 509, §22,44 Stat. 1437; May 26, 1934, c. 354, §5, 48 Stat. 807; June 25, 1938, c. 685, §10, 52 Stat. 1167.

District of Columbia Code:

§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.

The provisions of Chapter 18 of Title 33, U. S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat 600, ch. 612, §1.)

Effective Date

Section 3 of the Act May 17, 1928, provided that: "This Act [adding this section and section 36-502] shall take effect July 1, 1928."

STATEMENT OF THE CASE

On July 19, 1960, Charles E. Jones (hereinafter claimant or employee) was injured in the District of Columbia while working for Intercounty Construction Corporation (hereinafter employer) and on August 12, 1960, he filed a claim under the District of Columbia Workmen's Compensation Act, for workmen's compensation benefits, alleging permanent disability for said accident. (App. 2a) On August 23, 1960, Hartford Accident & Indemnity Company, the

workman's compensation for Intercounty (hereinafter carrier) filed an answer denying that the claimant was permanently disabled to the extent stated in his claim. (App. 3a) At the same time it filed a written notice with the Deputy Commissioner that payment of compensation had been begun without awaiting an award. (App. 3a) Compensation was then paid to the employee at the maximum weekly rate until April 20, 1965). (App. 3a)

On January 6, 1965, the carrier filed a written notice with the Deputy Commissioner that Charles Jones' claim would be controverted due to wages, extent of disability, and unauthorized medical care in St. Petersburg, Florida. (App. 3a) Additional compensation payments were paid by the carrier without an award for 50% temporary partial disability from April 21, 1965 until January 23, 1968. (App. 4a) On that date, the carrier filed BEC Form 208 indicating that compensation payments had been stopped since the statutory maximum of $17,280 under the District of Columbia Compensation Act had been paid (except for permanent and total disability). (App. 14a) Both the claimant and his attorney received a copy of said notice. (App. 16a) More than a year later, on February 11, 1970, Attorney Jefferson de R. Capps requested a hearing for compensation on a permanent total disability basis. (App. 16a)

Hearings were held on December 21, 1970, and January 14, 1971. (App. 4a) On May 24, 1971, respondent Noah C.A. Walter, Deputy Commissioner for the United States Department of Labor, Bureau of Employees Compensation, District of Columbia Compensation District, rendered a compensation order rejecting the claim of Charles E. Jones on the basis that more than one year had elapsed between the date of last compensation payment and the new claim

for permanent total disability advanced by the claimant's attorney. (App. 4a)

Suit was then filed by the employee to set aside the rejection of his claim in the U.S. District Court for the District of Columbia pursuant to 33 U.S.C. §921. (App. 4a) Counsel for the claimant and the defendant Deputy Commissioner eventually presented a consent order for remand to the court (the employer and carrier not being a party to the action), and the case was then sent back to the Deputy Commissioner for a further determination on the merits. (App. 4a) Pursuant to said remand on February 8, 1972, the Deputy Commissioner made an award for permanent and total disability to the claimant. (App. 4a)

Suit was then instituted by the employer and carrier, petitioners herein, in the U.S. District Court for the District of Columbia to set aside the Deputy Commissioner's second award, jurisdiction of said court being invoked under §33 U.S.C. §921. (App. 5a) On February 15, 1973, U.S. District Court Judge Aubrey E. Robinson, Jr., granted the carrier's motion for summary judgment, ruling that the 1-year statute of limitations in §22 of the Longshoremen's Act barred the employee's claim for additional compensation. (App. 13a) This ruling was reversed by the opinion of the United States Court of Appeals for the District of Columbia Circuit on July 3, 1974. The court expressly rejected a Fifth Circuit case on which the lower court relied, and the case was remanded back to the District Court for further proceedings, presumably for action on the other portions of the parties' cross-motions for summary judgment. (App. 12a)

REASONS FOR GRANTING WRIT

I. RESOLUTION OF CONFLICT BETWEEN FIFTH CIRCUIT AND DISTRICT OF COLUMBIA CIRCUIT

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed, not merely because it erroneously interprets the statute of limitations' provisions of the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to employment in the District of Columbia, but because it is in direct conflict with the Fifth Circuit appellate decision of *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887, *reh. denied,* 409 U.S. 1002 (1972).

That the issues here are identical to the *Strachan* case, *supra,* is apparent from reviewing the August, 1972, memorandum from the Solicitor General's office in *Strachan, supra,* opposing the granting of certiorari. The memorandum there took express note of the instant case, but opposed the granting of certiorari in the absence of a conflict within the circuits. (App. 17a-18a)

The District Court here expressly relied and cited *Strachan, supra,* as being dispositive of the statute of limitations issue in its order. (App. 13a)

Moreover, the United States Court of Appeals panel, in its decision, did not attempt to distinguish *Strachan* but rather rejected the reasoning contained therein outright. (App. 10a)

II. UNIFORMITY OF ADMINISTRATION OF LONGSHOREMEN'S ACT

The statute of limitations issue presented by this case is one that extends significantly beyond the particular parties involved herein and has national import in the various compensation districts throughout the country where the Longshoremen's and Harbor Workers' Compensation Act is administered. If the conflicting view of the Fifth Circuit and District of Columbia Circuit remain without resolution, then uniformity in the administration of the Act will be jeopardized.

Although the appellate decision herein remanded the case for a consideration of other issues raised by the parties' District Court Motions for Summary Judgment, the matter is ripe for the granting of certiorari inasmuch as a favorable ruling for the employer and carrier in this case on the statute of limitations issue will be dispositive of the entire case.

III. PLAIN LANGUAGE OF STATUTE INDICATES STATUTE OF LIMITATIONS BARS CLAIM.

The sole question presented in this regard is whether Sections 13 and 22 of The Longshoremen's Act, where no final compensation order has been issued, bar a claim for additional compensation which has been filed more than one year after voluntary compensation payments have ceased. Petitioners contend that it does.

In *Strachan Shipping Co. v. Hollis,* 460 F.2d 1108 (5th Cir. 1972), *cert. denied,* 409 U.S. 887, *reh. denied,* 409 U.S. 1002 (1972), the employee filed his original claim for workmen's compensation benefits within one year from when he was disabled. During the ensuing years numerous

informal conferences were held, and intermittent voluntary compensation payments were made by the workmen's compensation carrier. No formal hearing was ever held nor any formal compensation order entered.

Approximately twelve years after the date of last compensation payment, the claimant submitted a second written claim and compensation benefits were awarded to him by the Deputy Commissioner, the carrier's contention that the claim was barred by the statute of limitations being overruled. In both the District Court (323 F. Supp. 1123 (S.D. Tex., 1970)) and appellate consideration of the statute of limitations problem, it was held that since the claimant had not filed his second claim within one year from the date of last compensation payment, further compensation was barred by Section 22 of the Act.

The Fifth Circuit pointed out that the Act reflected a legislative intention to encourage voluntary payment of compensation benefits and to discourage formal hearings. In addition to policy considerations and general congressional intent to secure voluntary compliance with the Act by the employers, the court also noted that the language of Section 22 triggering the one year limitation period from the date of last compensation payment was plain. Therefore, it dismissed the claim of the employee as having not been timely filed since more than one year had expired from the date of last compensation payment. Certiorari was denied by the Supreme Court.

There is other precedent similarly interpreting the statute of limitations. Note, for example, *O'Keeffe v. U.S.F. & G. Co.*, 338 F.2d 21 (5th Cir. 1964), which was a cursory *per curiam* affirmance of the lower court's decision. In *O'Keeffe* the employee received compensation benefits for his back claim both before and after his written claim was

filed, but no formal award of compensation order was ever issued nor formal hearing held by the Deputy Commissioner. A second written claim was made for additional compensation more than one year after the last date of compensation payment. That claim was held as barred by Section 22 of the Act. (App. 19a-24a)

In the unreported case of *Maryland Casualty Co. v. Britton,* U.S. District Court for the District of Columbia, Civil Action No. 14297 (1942), where an appeal was initially noted by the government, but abandoned, Justice Jennings Bailey held that §22 necessitated a reversal of the Deputy Commissioner who had awarded benefits. There a written claim was filed by the employee due to the traumatic amputation of a finger. No formal hearing was held or compensation order issued, but the carrier did make voluntary payments of compensation. More than a year after the last payment, another written claim was filed but the court ruled it was untimely under Section 22. (App. 25a-33a)

Of more recent vintage is a decision under the District of Columbia Workmen's Compensation Act from Administrative Law Judge William Naimark on April 26, 1973, in the case of *Jessie Harris v. Ceco Corp., et al.,* Case No. 73-DCWC-5. No appeal was taken from his determination by the employee or the Director, Office of Workers' Compensation Programs. That case involved a claim for additional permanent partial disability to the body as a whole which was filed more than one year after compensation payments ceased. The judge, retracing the statute and applicable precedent, concluded that the claim was time-barred. (App. 34a-42a)

The significance of the foregoing authorities and holdings is to show that the statute of limitations' provisions

under the Longshoremen's Act have long been regarded as being plain and have so been construed at all levels from administrative law judges (who try the claims), to District Court Judges (who used to initially review the propriety of the compensation orders) to the Court of Appeals. That proposition was considered well-settled until the decision in this case from the District of Columbia Circuit Court panel.

IV. LEGISLATIVE HISTORY INTERPRETATION INDICATES STATUTE OF LIMITATIONS BARS CLAIM

The clarity of the words of Section 22 and the foregoing decisions should make it unnecessary to examine the legislative history of §22; however, if one does undertake such an examination, it merely serves to bolster the plain import of the limitations language. Prior to 1934, §22 applied only to claims adjudicated by a final compensation order. The 1934 Amendment to §22, however, indicated a Congressional intent to change this result. The original and amended sections provided in pertinent part as follows:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions *or because of a mistake in a determination of fact by the deputy commissioner,* the deputy commissioner may, at any time [during the term of an award and after the compensation order in respect of such award has become final] *prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued,* review a compensation case in accordance with the procedure prescribed in

respect of claims in Section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. . . ." [Additions to 1934 amendment italicized, deletions denoted by brackets.]

The impact of the 1934 Amendment is made clear by *American Mutual Liability Ins. Co. of Boston v. Lowe,* 85 F.2d 625, 627 (3d Cir. 1936). There, in considering whether the written claim of longshoreman Zagami, which had never been the subject of a formal compensation order was barred by §22, the Third Circuit compared §22's original language when the claimant was hurt in 1930 to the 1934 amendment which is applicable here. The court remarked, in holding the claim to be timely, that the 1934 amendment, which limited the deputy commissioner's power to . . . "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case," gave no indication of retroactivity and hence should not be so interpreted. Therefore, impliedly, if not expressly, the court suggested that a different result would pertain if the amendment which applies here controlled. Had this not been the case, there would have been no need to discuss it. Also see the same analysis in the lower court opinion in *Strachan Shipping Co. v. Hollis,* 323 F. Supp. 1122, 1125 (S.D. Tex., 1970).

The appellate decision here, however, in discussing *Lowe, supra,* disagreed and said, "the court did not say that the claim would be barred if no final order had been entered." (App. 11a). Yet the *Lowe* opinion, after holding that a Memorandum from the Deputy Commissioner was not a

final order and that the 1934 amendment was not retroactive, stated, "It follows that the claims existing at the date of the amendment were not thereby destroyed, and the time limitation therein prescribed began to run on the date of the enactment, May 26, 1934. *Sohn v. Waterson, supra.*" Thus the decision recognized that even where there was no final order, the statute of limitations under §22 applied; however, since the claimant's application for further consideration of his claim was filed on September 27, 1934, it was within a year and timely.

Reliance is also placed on *Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke,* 60 F.2d 35 (2d Cir. 1932) (App. 11a), but that case is similarly inapplicable since it was a decision rendered under the original provisions of §22 requiring the issuance of a formal compensation order. Since the 1934 amendment, §22's time provisions apply whether or not a compensation order has been issued.

The opinion here also seeks to buttress its holding by seizing on the Title to §22, "Modification of Awards" as requiring the issuance of a compensation order before the time provisions begin to run. (App. 6a). First of all that was the heading when the statute was first enacted in 1927. Surely the failure to amend the title cannot invalidate the later changes in the text. Secondly an award is the correct term only when a claimant receives benefits. Where, as here originally, the claimant does not prevail, the Deputy Commissioner issues a "Compensation Order – Rejection of Claim for Additional Compensation." (App. 43a)

If the Court's theory is correct, then where no award is made and a claim rejected, the employee's only recourse would be for a judicial review, in accordance with 33 U.S.C. §921, and yet this Court has held that in such circumstances, resort can be had back to the Deputy Commissioner within

a year for presentation of new evidence even if it is not newly discovered. *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 92 S. Ct. 405, 30 L. Ed. 2d 424 (1971).

V. NO LONG-STANDING AGENCY INTERPRETATION EXISTS

The panel opinion here also declares its refusal to set aside the Labor Department's settled interpretation of §22 which has stood for more than 35 years. (App. 11a) There is nothing contained in the record in this case to justify that such an interpretation exists other than the attachment to the concurring and dissenting opinion of Judge Ainsworth found in *Strachan, supra*, at 460 F.2d 1117. That letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, dated August 6, 1971, was a boot-strapping effort undertaken *ex parte* on appeal since the decision being appealed from there was delivered on November 6, 1970.

In addition, if this interpretation was so well-settled, how does one explain the 1942 decision in *Maryland Casualty Co. v. Britton* (App. 25a-33a), the 1964 O'Keefe case (App. 19a-24a), the 1973 Harris case (App. 34a-42a), and the initial result reached by Deputy Commissioner Walter in this case? In *Harris*, for example, no appeal was taken by the Director of the Office of Workers' Compensation Programs, and yet 33 U.S.C. §921, and the regulations implementing same authorize the Director to appeal decisions which affect the general administration of the Longshoremen's Act. There are numerous cases decided by the Benefits Review Board, the initial reviewing body, where the Director alone has appealed such diverse general administrative matters as allowance and apportionment of

attorney's fees, timeliness of appeals, etc. Certainly, if administrative law judge Naimark was disturbing the long-standing traditional interpretation of the Act's statute of limitations, an appeal would have been taken.

Concerning the compensation orders issued by Deputy Commissioner Walter, (the first rejecting the claim as being untimely and the second finding permanent and total disability), the only reason the second order was even required was because Leavenworth Colby, the Justice Department attorney who answered the employee's District Court suit against the Deputy Commissioner, admitted basically every allegation of the complaint and endorsed a consent order remanding the case back to Mr. Walter for a determination on the merits. It did not reflect the Deputy Commission's "long-standing interpretation" but rather Mr. Colby's view – the same view which he had unsuccessfully urged in the appellate proceedings in *Strachan Shipping Co., supra.*

VI. DECISION IS CONTRARY TO AVOWED PURPOSE OF THE ACT

The effect of the panel opinion in this case is contrary to the announced purposes of the Act. Employers are encouraged to promptly make voluntary payments to injured employees without going through formal hearings, for in many areas the statute is almost self-executing. *Atlantic & Gulf Stevedores v. Donovan*, 274 F.2d 794 (5th Cir. 1960). Employers who follow that approach and voluntarily pay compensation benefits without an award or compensation order, however, will lose the protection of the limitations period, while those who contest liability requiring the issuance of a formal compensation order will enjoy that protection. *Strachan Shipping Co. v. Hollis*, 323 F. Supp. 1122, 1124 (S.D. Tex., 1970).

That the voluntary approach is both encouraged and utilized with no formal hearing is graphically demonstrated by the following statistics gleaned from annual reports of the Department of Labor which counsel has been able to obtain:

Year	"Final disposition of injury cases: Number of cases closed:"	"Formal Hearings Completed"
1961	96,154	436
1962	95,094	420
1963	114,657	459
1965	135,873	452
1966	139,349	371
TOTAL	576,127	2,138

These figures demonstrate that over 99% of the time claims were adjusted without the necessity of a formal hearing, and although in theory formal orders may issue without a formal hearing, the instances where this is done are statistically negligible. The point is that if the panel's decision here is adopted throughout the country, then for the 5-year period referenced above, there are potentially a half million claims where the limitations period has not even begun despite their being listed in the Labor Department's annual reports as being finally disposed of and closed.

The beneficient purposes of the statute are undisputed. As this Court, however, stated in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 201, 72 S. Ct. 223, 96 L. Ed. 225 (1952).

> ". . . We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of

> limitations at will and make what was intended to be a limitation no limitation at all. Petitioners' construction would have the effect of extending the limitation indefinitely if a claim for disability had not been filed; the provision would then be one of extension rather than limitation. While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us."

A similar theme was sounded in *Strachan, supra:*

> "It may well be that our decision that the payment of September 3, 1957, was the "last payment" within the meaning of Section 22 of the Act (thereby triggering the one year limitations period with respect to modifications of compensation awards) will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations." 460 F.2d 1108, 1116 (5th Cir. 1972).

It is therefore significant that Congress recently embarked on a comprehensive overhaul of the Longshoremen's Act and yet left Section 22 intact. The various amendments to the Act were enacted on October 27, 1972, and became effective on November 26, 1972. The lower court opinion in *Strachan* was rendered on November 6, 1970, and the Court of Appeals affirmance was dated May 17, 1972. Since both the Assistant Director of the

Office of Longshoremen's and Harbor Workers' Compensation, United States Department of Labor, and the Special Assistant to the Attorney General were aware of that case, having been involved in same, and the Labor Department acted in an advisory capacity and participated in the drafting of this recent legislation, it can be assumed that either Congress was not dissatisfied with the court rulings interpreting Section 22 or in general it just declined to respond to invitations for change by the courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1569

INTERCOUNTY CONSTRUCTION CORPORATION
HARTFORD ACCIDENT & INDEMNITY COMPANY

v.

NOAH C. A. WALTER, DEPUTY COMMISSIONER, U.S. DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES COMPENSATION, APPELLANTS

MARY JONES, INTERVENOR

Appeal from the United States District Court for the District of Columbia

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Judgment entered this date ←

Decided July 3, 1974

Leavenworth Colby, Attorney, U.S. Department of Labor with whom *George M. Lilly*, Attorney, United States Department of Labor was on the brief, for appellant. *Harold H. Titus, Jr.*, United States Attorney

at the time the record was filed and *Ellen Lee Park*, Assistant United States Attorney also entered appearances for appellant.

John C. Duncan, III, for appellees.

Maurice C. Goodpasture was on the brief for intervenor.

Before: LEVENTHAL and ROBB, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *District Judge* SOLOMON.

SOLOMON, *District Judge*: The issue presented in this appeal is whether an injured workman who filed a timely compensation claim and whose employer paid compensation without awaiting an award is barred by Section 22 of the Longshoremen's and Harborworkers' Act (Act), 33 U.S.C. § 922, from seeking additional compensation because he did not file a second claim within one year after his employer stopped paying compensation.

Charles E. Jones (claimant) was injured on July 19, 1960, while working for Intercounty Construction Corporation (employer) in the District of Columbia. On August 12, 1960, he filed a claim for permanent disability under the District of Columbia Compensation Act, 45 Stat. 600, 36 D.C. Code 36-501, with the deputy commissioner of the Bureau of Employee Compensation of the Department of Labor.[1] The claim was filed within

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The District of Columbia Compensation Act incorporates by reference the Longshoremen's and Harborworkers' Act, 33 U.S.C. §§ 901 *et seq.*, as amended. The deputy commissioners of the Bureau of Employee Compensation of the Department of Labor administer both acts.

the period permitted by Section 13 of the Act.[2] The employer's insurance carrier, Hartford Accident & Indemnity Company (carrier), filed an answer on August 25, 1960, admitting that claimant was injured in the course of his employment but denying that he was permanently disabled to the extent stated in his claim. The carrier[3] also filed a notice that it had started to pay compensation without awaiting an award by the deputy commissioner, a procedure required by Section 14(a)[4] of the Act when liability is not controverted. The claimant was paid $54.00 per week, the amount payable for total disability.

On January 6, 1965, the carrier filed a notice that it was controverting Jones' claim on the grounds of wages, extent of disability, and unauthorized medical care. On April 27, 1965, the carrier informed the deputy commissioner that it was reducing claimant's compensation to $27.00 per week, the rate for 50 per cent temporary

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[2] Section 13(a) provides:

TIME FOR FILING OF CLAIMS

Sec. 13. (a) The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, . . . except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment.

[3] The term "carrier" shall include "employer" because in this case the interests of the carrier and the employer are identical.

[4] Section 14(a) provides:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

partial disability.[3] On June 1, 1965, the deputy commissioner notified the claimant that if he wanted to contest the reduction in payments he should see an attorney. On August 26, 1966, a claims examiner held a hearing at which claimant was present. The conference was adjourned without any recommendation on claimant's renewed claim for total disability benefits.

On January 23, 1968, the carrier stopped paying compensation because it had paid claimant $17,280.00, its maximum liability for any condition other than total permanent disability. On February 11, 1970, claimant requested a hearing on his claim for total permanent disability. Hearings were held on December 21, 1970, and January 14, 1971. On May 24, 1971, Deputy Commissioner Walter entered an order rejecting the claim because the request for a hearing was made more than one year after the carrier's final payment. He held that the claim was barred by Section 22 of the Act, 33 U.S.C. § 922.

Claimant filed an action in the district court to challenge the decision. Shortly thereafter, the Bureau of Employee Compensation concluded that the deputy commissioner's decision was incorrect and agreed to a consent decree remanding the case to the deputy commissioner for further proceedings.[4] On February 8, 1972, the deputy commissioner entered an order awarding claimant compensation for permanent total disability.

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[3] The change from total permanent to temporary partial disability limited the carrier's liability. Under the Act the maximum payable for partial disability was $17,280.00. 33 U.S.C. § 914(m) (1960). There is no maximum liability for total permanent disability.

[4] Neither the employer nor the carrier were parties to the district court action and neither consented to the remand.

Both the employer and the carrier brought this action under 33 U.S.C. § 921(b) to enjoin the deputy commissioner from enforcing the order. The district court granted summary judgment against the deputy commissioner. It held that the claim was barred by Section 22 of the Act. The court relied on *Strachan Shipping Co.* v. *Hollis*, 460 F.2d 1108 (5th Cir. 1972) *cert. denied*, 409 U.S. 887 (1972).

The carrier did not request a hearing before the deputy commissioner during the lengthy administrative proceedings, nor did it ask the deputy commissioner to enter a final compensation order. No compensation order was entered prior to Deputy Commissioner Walter's order of May 24, 1971, which was superseded by his order of February 8, 1972.

Deputy Commissioner Walter appealed. Mary Jones, guardian of the incompetent claimant, intervened.

The basic time limitations on the filing of claims are embodied in Section 13 of the Act. which requires filing within a year after injury or after the last payment of compensation, if compensation has been paid without an award. A further time limitation on action by the Deputy Commissioner is contained in Section 22, which provides:

> Modification of Awards
>
> Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accord-

ance with such section issue a new compensation order . . . . Such new order shall not affect any compensation previously paid . . . .

The parties, like the Fifth Circuit in *Strachan Shipping*, have focused the issue almost exclusively on Section 22. We will consider the interpretation of Section 22, taking into account its purpose and legislative history. Nevertheless, we think it is important to stress the bearing of Section 13 on that interpretation, and to note that the claim of the injured employee was filed within one year of his injury as prescribed by Section 13. The issue for the court is not merely the meaning of Section 22 taken by itself, but the proper relationship of Sections 13 and 22 as elements of a sensible and coherent pattern of the statute as a whole.

The carrier contends that the order of February 8, 1972, was barred by the "plain language" of Section 22 because claimant did not request additional compensation until more than one year after the carrier stopped making compensation payments. The deputy commissioner contends that the time limitation in Section 22 applies only to the modification of a final order and does not affect his authority to issue an original order for a claim filed within the time permitted by Section 13.

The deputy commissioner's interpretation of Section 22 as applying only to a modification of a compensation order and not as an additional time limitation on the original filing of a claim is supported by the section's statutory title, "Modification of Awards",[7] and by its reference to an order issued under the section as a "new compensation order". These clauses indicate that the section applies to cases in which a compensation order has already been entered. Similarly, the inclusion of "a mis-

[7] An "award" is a payment made under a compensation order. 33 U.S.C. § 919(e) (1972).

take in a determination of fact by the deputy commissioner" as a ground for modification of an award implies that a prior compensation order has been entered, since findings of fact are required only in compensation orders. *See* 20 C.F.R. §§ 31.12, 31.13 (1972).

Nevertheless, there is language in Section 22 which is directed to a situation in which no prior final order has been entered. The section provides that the deputy commissioner may review a case "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . ." This passage could mean that Section 22 applies even if no compensation order has been entered, or that it applies regardless of whether an order has been entered as of "the date of the last payment of compensation". The reference to "a change in conditions" as a ground for modification of an award is also ambiguous. It could refer to conditions found by the deputy commissioner to exist in a prior compensation order, or it could mean conditions which existed when payments were made without awaiting an order.

Since the language of Section 22 is ambiguous, we must look to other sources to determine whether Congress intended the time limitation in section 22 to apply to cases in which no final order was made.

Section 22, as enacted in 1927, permitted the deputy commisioner to review an order "at any time during the term of an award and after the compensation order in respect of such award has become final . . . ." Act of Mar. 4, 1927, c. 509, § 22, 44 Stat. 1437. Because of administrative delays and the Act's emphasis on voluntary compliance, carriers often not only paid compensation but also completed making payments before an order was entered. The deputy commissioner was unable to change the amount due the claimant because the "term

of the award" had expired with the last payment by the carrier. United States Employees' Compensation Commission, Seventeenth Annual Report, at 18 (1933); *Mille v. McManigal*, 69 F.2d 644 (2d Cir. 1934); *F. Jarka Co., Inc. v. Monahan*, 29 F.2d 741 (D.Mass. 1928).

In its Seventeenth Annual Report, the United States Employees' Compensation Commission complained that "Section 22 of the Longshoremen's Act provides [the deputy commissioner] with less authority to do justice to the parties than is contained in any provision for a similar purpose in any State compensation law." *supra* at 18. The Commission recommended that Section 22 be amended to read as follows:

> Sec. 22 Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time review a compensation order . . . [and] issue a new compensation order . . . , but such new order shall not affect any compensation paid or due under authority of the prior order. The power and jurisdiction of the deputy commissioner over each case shall be continuing, with authority, and after a hearing if applied for, to make such modification or change by a new compensation order whenever he may determine the interests of justice require a modification of an order formerly issued. *supra* at 18.

The Commission's reference to a "new order", "the prior order", and "modification of an order formerly issued" indicates that the Commission did not recommend that Section 22 be amended to apply to cases in which no final order had been entered.

In 1934, Congress amended Section 22 "to broaden the grounds on which a deputy commissioner can modify an award and also while strictly limiting the period, extend the time within which such modification may be made." H.R. Rep. No. 1244, 73d Cong., 2d Sess., April 16, 1934, at 4. The amendment was "in line with the

recommendation of the Commission except that it limits to 1 year after the date of the last payment of compensation the time during which such modification may be made." *Id.* The amendment deleted the original time limitation and substituted "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued." The phrase "whether or not a compensation order has been issued" was intended to make clear that the deputy commissioner has the authority to modify awards, within the prescribed period, even in cases in which the original compensation order was issued after all payments have been made to the claimant. The amendment did not change the purpose of the section, which, according to the House Report, was to allow deputy commissioners to "modify an award".

In 1938, Section 22 was amended to permit the deputy commissioner to make an award in a case in which he had originally rejected the claim. Act of June 25, 1938, c. 685, § 10, 52 Stat. 1167. The House Report said that "[t]he purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases *finally acted upon by the deputy commissioner.*" (emphasis supplied) H.R. Rep. 1945, 75th Cong., 3d Sess., March 14, 1938, at 9.

In our view, the legislative history shows that Congress intended Section 22 to apply only to cases in which the deputy commissioner had "finally acted" by issuing or denying a compensation order. The amendment was not intended to impose an additional time barrier to recovery by claimants who filed within the time permitted by Section 13, and were still awaiting an order on the filed application.

The Fifth Circuit came to the opposite conclusion. A divided panel of that court held in *Strachan Shipping Co. v. Hollis*, *supra*, that Section 22 barred timely filed

claims which were not refiled within one year after the last payment of compensation, even when no compensation order had been entered. The court did not discuss the legislative history and relied on the "plain language of Section 22". The *Strachan* majority said that:

> It would not be equitable, in our opinion, for courts to approve the deputy commissioner's vigorous efforts to secure voluntary compliance with the Act on the part of employers and their insurers while simultaneously approving the deputy commissioner's refusal to terminate compensation cases, by means of formal orders as envisioned in Section 22 of the Act, when voluntary payments are made.
>
> . . . .
>
> It may well be that our decision . . . will make it difficult for injured employees to obtain adequate compensation commensurate with the full extent of their physical disabilities. Should that eventuality occur, it would be for Congress either to lengthen Section 22's limitations period or to provide other means to postpone the running of the statute of limitations. 460 F.2d at 1116

We reject the reasoning of the Fifth Circuit. A carrier at any time can compel the deputy commissioner to hold a hearing on a pending claim and determine its liability within twenty days after the hearing. *See* 33 U.S.C. § 919(c); 5 U.S.C. § 706(1); *cf. Atlantic & Gulf Stevedores, Inc. v. Donovan*, 274 F.2d 794 (5th Cir. 1960). There is no inequity in continuing pending claims when the carrier can compel a prompt determination.

Here the carrier did not ask for either a formal hearing or the entry of a compensation order, even though such an order would have started the one-year period in which modifications are permitted by Section 22.

The *Strachan* majority did not follow a long-standing and rational interpretation of the Act by the agency charged with the administration of the Act. The regulation issued under Section 22, promulgated on May 31,

1938, interprets Section 22 as affecting only those cases in which a final order was entered; it does not refer to cases in which an order was not issued.[8] We are unwilling to join the Fifth Circiut in setting aside an agency interpretation that has stood for more than 35 years. *See* Ainsworth, J., concurring and dissenting in *Strachan, supra* at 1117; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965).

A timely filed claim remains pending until a compensation order is entered by the deputy commissioner. *See Lumber Mutual Casualty Ins. Co. of N.Y. v. Locke*, 60 F.2d 35 (2d Cir. 1932); *American Mutual Liability Ins. Co. of Boston v. Lowe*, 85 F.2d 625 (3d Cir. 1936).[9] Appellant argues that a claim is analogous to a complaint filed under the Federal Rules of Civil Procedure, which remains pending until disposed of by an order of court. We think the analogy has merit. It would be anomalous to require an injured workman to refile a claim in order to preserve his right to compensation when a plaintiff in a civil action does not have to refile his complaint in order to preserve his action. We also believe that such a requirement would contradict the statutory command that the deputy commissioner shall not be bound by "technical or formal rules of procedure" in proceedings under the Act. 33 U.S.C. § 923(a).

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[8] The regulation refers only to "application[s] . . . for modification of an award". 20 C.F.R. § 31.16(a) (1972).

[9] Appellees cite *Lowe* for the proposition that the one-year limitation in Section 22 applies regardless of whether a compensation order has been issued. The *Lowe* court said in dicta that a claim would be barred by Section 22, as amended in 1934, "if we assume that the memorandum . . . was a final order within the terms of the statute". The court did not say that the claim would be barred if no final order had been entered.

The Fifth Circuit's holding bars timely filed unadjudicated claims unless claimants file new claims within one year after their carriers stop paying compensation. Carriers may find it to their advantage to stop payments frequently in the hope that claimants not familiar with the agency's regulations would neglect to file another claim.[10]

The Longshoremen's and Harborworkers' Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *see B & P Steamboat Co. v. Norton*, 248 U.S. 408 (1932). It would be harsh and incongrous to force a claimant to refile an unadjudicated claim each time his carrier terminated payments to avoid having his right to compensation permanently barred.

We hold that Section 22 applies only to cases in which a final compensation order has been entered or denied. A claimant, in order to preserve his claim, is not required by Section 22 to refile his timely filed but unadjudicated claim after a carrier stops paying compensation.

All parties agree that appellees are liable for claimant's medical expenses.

The judgment of the district court is reversed. The case is remanded for further proceedings consistent with this opinion.

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[10] *See* letter from John E. Stocker, Assistant Director of the Office of Longshoremen's and Harborworkers' Compensation, to Leavenworth Colby, August 6, 1971, appended to the opinion of Ainsworth, J., concurring in part and dissenting in part in *Strachan, supra* at 1117.

In *Strachan* the carrier stopped paying compensation four times and stopped paying medical benefits twice during a fourteen-year period. Although the repeated termination of benefits in *Strachan* may not be typical, it does show that claimants may be forced to refile claims repeatedly if each termination starts the limitations period to run.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INTERCOUNTY CONSTRUCTION CORPORATION, *et al.*, *Plaintiffs*,	:	
v.	:	**Civil Action No. 297-72**
NOAH C.A. WALTER, Deputy Commissioner, *Defendant*.	:	

ORDER

Upon consideration of Plaintiffs' motion for summary judgment, Defendant's opposition thereto, and upon consideration of the entire record herein, it appearing to the Court that Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §922, is a bar to the jurisdiction of the Deputy Commissioner to enter the challenged compensation order herein, Strachan Shipping Co. v. Hollis, 460 F.2d 1108 (5th Cir. 1972), it is this 15th day of February, 1973.

ORDERED, that Plaintiffs' motion for summary judgment be and is hereby granted, and it is

FURTHER ORDERED, that Defendant be and is hereby permanently restrained and enjoined from carrying into effect any part of the February 8, 1972 order and award of benefits to claimant Charles E. Jones.

/s/ AUBREY E. ROBINSON, JR.
Judge

Dated: February 15, 1973

App. 14

BUREAU OF EMPLOYEES' COMPENSATION — WORKERS' COMPENSATION PROGRAM

COMPENSATION PAYMENT STOPPED OR SUSPENDED

1. BEC CASE NUMBER
2. CARRIER'S NUMBER 26

INSTRUCTIONS: This notice must be filed with the Deputy Commissioner within 16 days after stoppage or suspension of compensation. If payments have stopped temporarily, or are being resumed, and you intend to terminate payments shortly, or are continuing payments, so indicate in item 11, giving reasons.

3. NAME AND ADDRESS OF EMPLOYEE (Place address sticker here)

Charles E. Jones
2517 - 3rd. Avenue,N.
St.Petersburg, Florida 33713

D.C. exhibit NO 2

NOTE
Retain only copies 2 and 3.
Send copies 1, 4, 5, and 6 to the Deputy Commissioner who will forward employee's copies to him.

4. NAME OF EMPLOYER: Intercounty Construction Company
5. ADDRESS OF EMPLOYER: P.O. Box 329, Hyattsville, Maryland
6. DATE OF INJURY: 7/19/60
7. DATE EMPLOYEE FIRST DID NOT WORK BECAUSE OF INJURY: July 20, 1960
8. DATE PHYSICIAN FOUND EMPLOYEE ABLE TO RETURN TO WORK:
9. DATE EMPLOYEE RETURNED TO WORK:
10. (Maximum compensation rate—$70.00 per week) AVERAGE WEEKLY WAGE $ 81.00 MULTIPLIED BY 2/3 = COMPENSATION RATE $ 27.00 (50%)
11. GIVE REASONS WHY PAYMENTS HAVE BEEN STOPPED OR SUSPENDED: Carrier has paid $17,280.00 maximum payable under the D.C.Act for Temp. Total and Temp Part.
12. DATE OF THIS NOTICE: January 23, 1968
13. DATE LAST PAYMENT MADE: January 23, 1968

14. LIST ALL DISABILITY PAYMENTS

TYPE OF DISABILITY	FROM (Mo., day, yr.)	TO (Mo., day, yr., inclusive)	AMOUNT PAID PER WEEK	NUMBER OF WEEKS PAID	TOTAL
TEMPORARY TOTAL	7/20/65	1/20/65	$54.00	248 Wks.	$13,392.00
TEMPORARY PARTIAL	1/21/65	1/23/68	$27.00	144 Wks.	$3,888.00
*TEMPORARY PARTIAL					
PERMANENT PARTIAL (Non-scheduled)					
PERMANENT TOTAL					
*PERMANENT PARTIAL (Schedule loss, facial disfigurement)	PERCENT	PART OF BODY			
				TOTAL →	$17,280.00

*REPORT OFF THIS LINE PAYMENT FOR DIFFERENT PERIOD OR RATE THAN GIVEN IN PREVIOUS LINE

15. LIST ALL PAYMENTS MADE ON ACCOUNT OF DEATH

a. NAMES OF DEPENDENTS	b. AMOUNT	c. OTHER EXPENSES	d. AMOUNT
		FUNERAL EXPENSE	
		NO DEPENDENTS—PAID TO TREASURER, U.S.	
		TOTAL (Cols. b & d) →	

16. NAME OF INSURANCE CARRIER OR SELF-INSURED EMPLOYER
HARTFORD ACCIDENT AND INDEMNITY COMPANY

17. SIGNATURE OF PERSON AUTHORIZED TO SIGN FOR CARRIER: Richard W. Lindsey
18. TITLE OF PERSON WHOSE SIGNATURE APPEARS IN ITEM 17: Compensation Supervisor

CA SEC—324 (Rev. 1963)

1—DEPUTY COMMISSIONER

T-291 10

App. 15

Law Offices
of
JEFFERSON DE R. CAPPS
3440 FIFTH AVENUE NORTH
ST. PETERSBURG, FLORIDA 33713

TELEPHONE 813/894-4231

T-296 C 1+2 NS 11 4.

Mr. C. M. Moore
Claims Examiner
U. S. Bureau Employees Compensation
P. O. Box 35049
Jacksonville, FL 32202

Dear Mr. Moore:

Re: CHARLES E. JONES
Date of Injury: 19 July 1960
Inter-County Construction Corp.
File Nr. DCCA - 15144-62
Carrier's File Nr. 26 (Hartford Ins. Group)

Jefferson de R. Capps, Esq., as counsel for the claimant, CHARLES E. JONES, and KURT P. HAMPP, Esq., counsel for the carrier, HARTFORD INSURANCE GROUP, do hereby stipulate the following as to the above referenced claim:

1. The claimant, CHARLES E. JONES, claims 100% permanent total disability and inability to perform any gainful activity since 19 July 1960.

2. The deposition of ALFRED D. KOENIG, M.D., psychiatrist and neurologist, of St. Petersburg, Florida, may be taken by the claimant and the same is jointly stipulated into evidence for the formal hearing in this cause in lieu of the live testimony of this physician.

3. Currently, the claimant, CHARLES E. JONES, is receiving Veterans Administration and Social Security benefits for 100% disability which benefits are the claimant's only source of income.

4. The claimant, CHARLES E. JONES, duly filed his claim for permanent disability in the above cause with the Bureau on 18 August 1960.

5. The claimant, CHARLES E. JONES, received a copy of form entitled, "Important Notice to Employee", dated 27 April 1965 by carrier, setting forth that claimant had been paid temporary total compensation from 20 July 1960 to 28 April 1965 at $54.00 per week for a total amount paid of $13,392.00, and that claimant was ready for permanent rating.

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6. The claimant, CHARLES E. JONES, received a copy of form entitled, "Payment of Compensation Without Award", signed on 27 April 1965 by carrier, setting forth that claimant's weekly wage rate of $81.00 per week would for disability compensation purposes be $27.00 per week (50% of 2/3 of $81.00), said compensation to be paid from 21 April 1965 and commence on 4 May 1965.

7. The employer, through the carrier, filed an Important Notice to Employee, dated 23 January 1968, that as "Carrier has paid $17,280.00 maximum payable under the D.C. Act or (sic:"for") Temp. Total and Temp. Partial", last payment being made on 23 January 1968, payments were stopped or suspended by carrier. Further, that claimant received a copy of said notice.

8. All reports by all doctors as to examination or treatment of claimant shall be stipulated into evidence for the formal hearing in this cause, but carrier or claimant reserve the right to object to the conclusions that may be set forth therein.

9. Claimant acknowledges that the carrier objects to the affidavit of FREDERICK T. SHUE, dated 5 May 1970 filed with the Bureau by letter from claimant's attorney dated 9 July 1970.

10. Letter from Bureau of Disability Insurance, Social Security Administration, dated 2 November 1967, setting forth claimant's record of earnings credited to his social security account for years 1955 through 1960, the same being filed with the Bureau by letter from claimant's attorney, dated 3 April 1970, shall be stipulated into evidence for the formal hearing in this cause.

11. Claimant's attorney, Jefferson de R. Capps, first informed the Bureau that he represented claimant by his letter dated 2 December 1969.

12. Claimant's attorney, Jefferson de R. Capps, first requested hearing upon claimant's claim for compensation for permanent disability by letter to the Bureau dated 11 February 1970.

13. Claimant's attorney agreed to provide carrier's attorney of claimant's rehabilitation efforts since injury on 19 July 1960.

Dated: 15th September 1970

J. de R. Capps

JEFFERSON de R. CAPPS
Attorney for Claimant,
CHARLES E. JONES

KURT PRESTON HEADY
Attorney for Carrier,
HARTFORD INSURANCE GROUP

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n the Supreme Court of the United State.

OCTOBER TERM, 1972

No. 71-1624

MOSES LEWIS, JR., PETITIONER

v.

STRACHAN SHIPPING COMPANY and LEE H. HOLLIS, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

This case originated in a claim filed by petitione n 1956 against his employer and its compensation :arrier pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* In 1970, thirteen years after the last payment of :ompensation was made in 1957 pursuant to an informal agreement of the parties, the Deputy Commissioner entered a compensation order favorable to

petitioner. Petitioner now seeks review of the determination of the court of appeals that the one-year limitation provision of 33 U.S.C. 922 barred the 1970 order.

In both courts below, the government supported petitioner's contention that the one-year statute of limitations contained in Section 922 did not operate as a bar to entry of the 1970 compensation order. While the Department of Labor adheres to this position, we nevertheless do not believe that in the absence of a conflict between the circuits, review by this Court is warranted. (We note that a case involving the same issues raised here, *Intercounty Construction Corp.* v. *Walter*, Civil Action No. 297-72, is now pending in the District Court for the District of Columbia.)

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

July 10, 1957	– Accidental injury resulting in aggravation of spondylolithesis sustained by employee.
September 28, 1957	– Appellees paid eleven and one-seventh weeks of compensation to employee for period from July 11, 1957 to September 28, 1957, amounting to $411.12 (R. 111).
August 30, 1958	– Surgical treatment furnished to employee but no compensation paid.
September 26, 1958	– Compensation claim filed by employee with Deputy Commissioner.
August 26, 1959	– Final payment of compensation made to employee for period from September 28, 1957 to November 28, 1958, in the amount of $1,926.14, plus attorney fee of $275.00, to his attorney, for sixty-one and one-seventh weeks.
July 4, 1961	– Employee wrote a letter to the Deputy Commissioner (R. 150-152), which the Deputy Commissioner interpreted as a claim for compensation although not served on the appellees (R. 88).
August 17, 1962	– Additional surgical treatment furnished but no compensation paid.
October 11, 1962	– Another letter from the employee to the Deputy Commissioner (R. 154-155) which the Deputy Commissioner interpreted as a claim for compensation (R. 88).
February 21, 1963	– Deputy Commissioner entered award for additional compensation (R. 4-5).
February 28, 1963	– Complaint to suspend or modify the award filed by Appellees (R. 13).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
OCT 3 - 1963
JACKSONVILLE, FLA.
JULIAN A. BLAIR
CLERK

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation, and GIBBS CORPORATION, a corporation,

Plaintiffs,

v.

No. 63-35-Civil-J

WILLIAM M. O'KEEFFE, as Deputy Commissioner United States Department of Labor, Bureau of Employees' Compensation, Sixth Compensation District,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

After due notice, the motion of defendant for summary judgment was argued and submitted upon a complaint and its exhibits and the certified copy of the transcript of the proceedings held by the defendant, together with attached exhibits.

At the beginning of the hearing, plaintiffs filed before the Court a motion for judgment on the pleadings.

The arguments of counsel for the respective parties were by consent directed to both of said motions.

From the pleadings and the attached exhibits it appears that on July 10, 1957, an employee of Gibbs Corporation, Walter W. Williams, sustained an injury by accident which entitled him to compensation payments under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, et seq. Written notice of said injury was not given within thirty days, but a written claim for compensation was filed by the employee with defendant on September 26, 1958. Thereafter plaintiffs, without an award, paid compensation benefits found to be due said employee to and including November 28, 1958, and furnished medical treatment to him in accordance with the Act. Thereafter no further claim was made for compensation benefits until more than one year after the last payment of compensation.

A hearing was held by defendant at which plaintiffs objected to the claim on the ground that it had not been presented within one year after the last payment of compensation. The deputy commissioner nevertheless entered an award, which plaintiffs by this suit seek to vacate on the ground that the claim is barred by the limitation of one year.

Section 913(a) provides that "the right to compensation is barred unless a claim therefor is filed within one year after the injury, except

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". . . if payment of compensation has been made without an award on account of such injury . . . **a claim may be filed within one year after the date of the last payment.**" (Emphasis added)

Although a claim for compensation had been filed within one year after the injury, compensation was paid without an award for all of the disability claimed and sustained by the employee. This disposition of the claim by payment was reported to the employee by the defendant's letter of August 21, 1959. Carrier's Exhibit 7 at the hearing.

The right of the employee to any additional compensation then became subject to Section 922 of the Act which provides that upon the application of any party on the ground of a change in conditions the deputy commissioner may,

> ". . . at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued . . . review a compensation case in accordance with the procedure prescribed . . . " (Emphasis added.)

As no claim or application was presented by the employee within this one year period, he has no right under this section of the Act to claim additional compensation benefits. Section 914(h), which authorizes the deputy commissioner upon his own initiative in certain situations to hold hearings, does not permit such action to be taken after the claim is barred by the one year limitation. Ocean Accident & Guarantee Corp. v. Lawson, (CA 5th) 135 F. 2d 865; and Bajerczak v. B. H. Sobelman & Co., Pennsylvania, 89 F. Supp. 78, which

cites Lawson with approval. Nowhere in the Act is there any indication of an intent by Congress to permit a claim for compensation to be asserted later than one year after the last payment of compensation.

As there is no genuine issue as to any material fact presented and as it appears as a matter of law from the pleadings and the attached exhibits that plaintiffs are entitled to the relief prayed for in the complaint and that the award referred to in the complaint should be suspended and plaintiffs relieved from making the payments of compensation therein ordered to be paid, plaintiffs' motion for judgment on the pleadings should be granted. 3 Federal Practice and Procedure (Barron & Holtzoff), page 178; American Auto Ins. Co. v. Indemnity Ins. Co. of North America, 108 F. Supp. 221, affirmed 228 F. 2d 622; Carpineta v. Shields (Fla.), 70 So. 2d 573, 48 A.L.R. 2d 1185; 6 Moore's Federal Practice, Section 56.12, page 2088, 2089; Potomac Insurance Company v. Boles, 205 F. Supp. 879.

Upon consideration, it is

ORDERED AND ADJUDGED:

1. There is no genuine issue as to any material fact and plaintiffs are entitled to judgment on the pleadings as a matter of law.

2. Judgment is hereby entered in favor of plaintiffs and against defendant, and the award entered by defendant on February 21, 1963, awarding compensation to the employee, Walter W. Williams, is vacated and set aside, and defendant is ordered and directed to enter an award pursuant hereto vacating said award and entering an award denying the claim of the employee for compensation benefits.

3. Judgment on the pleadings having been granted against defendant and in favor of plaintiffs, the motion for summary judgment of defendant is denied.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of October, 1963.

Judge

Copies to all counsel

— BEST COPY AVAILABLE

IN THE DISTRICT COURT OF THE
UNITED STATES FOR
THE DISTRICT OF COLUMBIA

MARYLAND CASUALTY COMPANY, a body corporate, *Plaintiff,* vs. THEODORE BRITTON, Deputy Commissioner, United States Employees' Compensation Commission, District of Columbia Compensation District, and JOSEPH FRANCIS McFADDEN, *Defendants.*) Civil Action No. 14297

[Filed May 22, 1942]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on to be heard upon the joint Motion of the defendants to dismiss the Complaint for Injunction filed herein, and upon consideration thereof, the Court this 22nd day of May, 1942, makes and adopts the following:

FINDINGS OF FACT

That on August 8, 1936, Joseph Francis McFadden was employed by the Washington Times Herald as a Linotype operator; that the liability of said employer for compensation under the District of Columbia Compensation Act was at that time insured by the plaintiff, Maryland Casualty Company; that on said day while so employed said employee caught the second finger of his left hand in a Linotype

machine, as a result of which he suffered a traumatic amputation of the terminal phalanx of said finger, which injury resulted in temporary total disability for which said insurance carrier paid compensation to said employee in accordance with the provisions of the District of Columbia Compensation Act; that also as a result of said traumatic amputation, the employee sustained a 50 per cent loss of use of his finger for which, on November 10, 1936, said employee filed with the Compensation Commission a written claim for compensation and at the same time and on a form prescribed by the Compensation Commission pursuant to its long established practice and procedure, said employee also signed a written waiver of his right to a formal hearing and indicated his willingness to accept permanent partial disability compensation on the basis of a 50 per cent loss of use of the finger, to all of which said insurance carrier agreed; that said agreement was prepared, approved and accepted by one of the claims examiners acting on behalf of the Deputy Commissioner and thus established the extent of the loss of the finger; that on November 20, 1936, said claims examiner wrote a letter to said insurance carrier to pay additional compensation in the sum of $225, for said established 50 per cent permanent partial loss of the finger; that in said letter said claims examiner stated, "When payment has been completed, kindly furnish this office with Form DCCA308, on receipt of which the case will be closed"; that on January 4, 1937, said insurance carrier filed with the Deputy Commissioner a Form DCCA308, which showed a total payment to the employee of $532.25; that said amount was the sum of the temporary total disability compensation and the permanent partial disability compensation by reason of the 50 per cent loss of the finger; that neither the employer nor the insurance carrier had controverted the employee's claim and, in accordance with the established procedure, no formal award

was rendered; that on April 28, 1938, the employee complained that percussion of the digital nerve caused pain, whereupon the area was excised to relieve the discomfort; that by reason of this minor operation the employee suffered temporary total disability for five weeks, for which said insurance carrier voluntarily paid the employee, the last payment of compensation being made on May 27, 1938, and a Supplemental Form DCCA308 being filed by said insurance carrier on June 3, 1938, with the Deputy Commissioner; that on June 20, 1941, the employee again filed a written claim against the employer setting forth said injury which occurred in 1936, and further stating that on March 16, 1941, he had struck said finger on a steel frame; that said claim also stated that the entire finger had been amputated to relieve the employee of pain due to the sensitive condition of the stump; that said insurance carrier did not insure said employer during 1941, and no previous notice of the second alleged injury to the finger or the reamputation of the finger had been given said insurance carrier; that on June 25, 1941, said insurance carcier controverted the right of the employee to further compensation from it on the ground that no claim was made within one year from the date of the last payment of compensation and that no notice was given to it that the employee intended to have the entire finger amputated or that such amputation was necessary; that on November 23, 1941, a formal hearing of said claim was had before the Deputy Commissioner who, on December 19, 1941, filed a compensation order awarding compensation to said employee in which the Deputy Commissioner found the facts relative to the injury sustained by said employee to be, in part, as follows:

> . . . "that on the 2nd day of April, 1941, and again on the 12th day of June, 1941,

it was found necessary as a result of the condition known as 'snap joint' in the claimant's amputated second left finger to re-amputate the stump of the finger on the inner side of the proximal interphalangeal joint; that these re-amputations were necessary as a result of the injury of the 8th day of August, 1936, above described; that as a result of the re-amputations of April 2, 1941, and June 12, 1941, the claimant was wholly disabled from the 2nd day of April, 1941, to the 8th day of July, 1941, inclusive, a period of 14 weeks, and he is entitled to compensation at the rate of $25 a week in the amount of $350 for such temporary total disability; that as a further result of the said re-amputations the claimant has suffered the total loss of the remaining one-half (50 per cent) of his injured finger, and he is entitled to 9 weeks' compensation from the 9th day of July, 1941, to the 9th day of September, 1941, at the rate of $25 per week, amounting to $225, for such permanent partial disability, or a total of $575 as compensation for temporary total disability and permanent partial disability suffered subsequent to March 16, 1941, as a result of the injury of the 8th day of August, 1936; that the employer, Washington Times-Herald, and the insurance carrier, Hartford Accident and Indemnity Company, are liable only for the payment of compensation for the temporary total disability (1 week), which resulted from the injury of the 16th day of March, 1941, and that the employer, Washington Times-Herald, and the insurance carrier, Maryland Casualty Company, are liable for the payment of the remainder of compensation for the disability found above;" . . .

that during 1938 and continuously thereafter, said employee had knowledge of the nature and extent of the injury to

his finger, and knew that he had developed a condition known as "snap joint" in the proximal interphalangeal joint of the second finger of the left hand; which caused the finger to remain in an extended position most of the time; and that the employee did not within one year after the time he had knowledge of such condition apply to the Deputy Commissioner for a review of his compensation case.

CONCLUSIONS OF LAW

WHEREUPON, the Court concludes as a matter of law

1. That the findings of fact of the Deputy Commissioner in the compensation order filed December 19, 1941, complained of in the Complaint, including the findings of fact to the effect that the plaintiff is liable to pay compensation for temporary total disability and permanent partial disability by reason of the re-amputation of the second finger of the left hand, are as a matter of law not supported by competent and substantial evidence, and said findings of fact are, therefore, not in accordance with law.

2. That this case is governed by Sec. 22 as amended of the Compensation Act wherein it is provided that the Deputy Commissioner may at any time prior to one year after the last payment of compensation, whether or not a compensation order has been issued, review a compensation case and issue a new compensation order; that the employee did not ask for a review of his compensation case within one year after the last payment of compensation to him, nor within one year after the employee knew that he had developed a condition known as "snap joint" in the proximal interphalangeal joint of the second finger of the left hand, which caused the finger to remain in an extended position most of the time; that the employee's

application for compensation by reason of the ultimate loss of the entire finger was not timely made within one year, as provided by Sec. 22 as amended of the Compensation Act.

3. That by the filing of the employee's claim on November 10, 1936, and the simultaneous execution by him with the approval of the Compensation Commission of a written waiver, on a printed form prescribed and furnished by said Commission, of his right to a formal hearing and of his willingness to accept permanent partial disability compensation as therein stated, the amount and extent of the employee's disability thereby became established and fixed, and no formal award was necessary, the Compensation Act providing that "compensation under this Act shall be paid periodically, promptly, and directly to the person entitled, without an award, except where liability to pay compensation is controverted by the employer"; that thereafter if the employee suffered any change in his condition, then he should have complied with the provisions of Sec. 22 as amended of the Compensation Act, and that his failure to do so within one year from the date of the last payment of compensation by the carrier, barred the employee from any further right or claim to compensation.

/s/ JENNINGS BAILEY
Justice

No objection as to form.

/s/ BERNARD J. LONG,
Bernard J. Long,
Assistant United States Attorney,
Attorney for defendant Britton.

/s/ FRANK H. MYERS
Attorney for defendant McFadden.

[Filed May 11, 1943]

* * *

GREETING:

WHEREAS, lately in the District Court of the United States for the District of Columbia, before you or some of you, in a cause between Maryland Casualty Company, Inc., Plaintiff, and Theodore Birtton, Deputy Commissioner, United States Employee's Compensation Commission, District of Columbia Compensation District, *et al.*, Defendants, Civil Action No. 14297, wherein the order of the said District Court entered in said cause on the 22nd day of May, 1942, is in the following words, *viz:*

ORDER SETTING ASIDE AND ENJOINING ENFORCEMENT OF COMPENSATION ORDER

This cause having been heard upon the joint motion of the defendants to dismiss the complaint filed therein, and the Court having entered an order on April 20, 1942, overruling said motion, and it appearing to the Court that the defendants have declined to answer, or otherwise plead further to the complaint, and have elected to stand on the ruling upon said motion, it is, by the Court, this the 22nd day of May, 1942:

1. ORDERED, That the compensation order filed on December 19, 1941, by the defendant, Theodore Britton, deputy commissioner, awarding compensation to the defendant Joseph Francis McFadden, under the District of Columbia workmen's compensation law, be, and the same is, hereby set aside in whole, and it is further

2. ORDERED, That the defendants, Theodore Britton, deputy commissioner, and Joseph Francis McFadden, be,

and they are, hereby permanently restrained and enjoined from enforcing or attempting to enforce said compensation order, award of compensation, filed by the said defendant Britton as deputy commissioner, on December 19, 1941.

Jennings Bailey,
Justice

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

AND WHEREAS, in the term of October , in the year of our Lord one thousand nine hundred and forty-two , the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and on a motion to dismiss and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this court that this cause be, and the same is hereby, dismissed for failure to take the appeal therein within the time prescribed by Rule 10 of this Court. See also Rule 32(b).

October 8, 1942.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS the Honorable HARLAN F. STONE, Chief Justice of the United States, the tenth day of May , in the year of our Lord one thousand nine hundred and forty-three.

/s/ JOSEPH W. STEWART

Clerk of the United States Court of Appeals for the District of Columbia.

[Filed May 11, 1943]

* * * *

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WORKMEN'S COMPENSATION PROGRAMS

JESSIE HARRIS, *Claimant,* vs. CECO CORPORATION, *Employer,* GENERAL ACCIDENT FIRE AND LIFE ASSURANCE, *Insurance Carrier.*	:	**ORDER AND AWARD OF COMPENSATION** **Case No. 73-DCWC-5** **Formerly 40-05849**

Before: William Naimark, Administrative Law Judge

STATEMENT OF THE CASE

Pursuant to the Longshoremen and Harbor Workers' Compensation Act, the District of Columbia Workmens' Compensation Act, and the Rules and Regulations implementing the said statutes, a Notice of Hearing was issued on March 2, 1973 by the Chief Administrative Law Judge of the U.S. Department of Labor.

A hearing was duly held before me on March 21, 1973 at Washington, D.C. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter the parties filed briefs which have been duly considered.

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings, conclusions, award, and order:

FINDINGS OF FACT

1. In June, 1966 the above-named claimant was in the employ of the employer herein, CECO Corporation, whose address is 1701 - 47th Avenue, Northeast, Washington, District of Columbia. The said employer was subject to the provision of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes." The liability of the employer for compensation under the said Act was insured by General Accident Fire and Life Assurance.

2. On June 8, 1966 the claimant, while performing his duties as a carpenter's helper, was hit by an iron pan which slipped out of another employee's hand as he attempted to throw the pan up to another level, and the claimant suffered an injury diagnosed on June 9, 1966 as blunt trauma to the abdomen with resultant anorexia of right lower quadrant.

3. At the suggestion of the employer the claimant on June 8, 1966 visited the Northeast Industrial Clinic, 1236 - 5th Street, Northeast, Washington, D.C., where his injury was misdiagnosed as acute appendicitis; and the claimant refused to submit to surgery as suggested by the physician at said clinic. The said physician advised claimant to seek medical treatment when he returned home to Baltimore, Maryland.

4. On June 9, 1966 claimant visited University Hospital, Baltimore, Maryland and was treated thereat for a muscle contusion.

5. Commencing on or about June 9, 1966 claimant, on his own initiative and with no consent from, or approval

by, the employer herein, commenced visits to Dr. Calvin P. Hornstein, a chiropractor in Baltimore, Maryland and from the aforesaid date until March 6, 1970 the claimant was treated by Dr. Hornstein, during which period claimant was x-rayed, as well as given examinations and therapy treatments for the injury sustained while working for the employer.

6. At no time since the injury on June 8, 1966 had the employer refused or neglected to furnish necessary medical services to claimant.

7. A thirty day written notice of the injury was given to the employer herein, and the claimant filed an "Employees Claim for Compensation" within one year of the date of the injury with the Bureau of Employees' Compensation, U.S. Department of Labor.

8. In accordance with the recommendation of the Bureau of Employee Compensation, the employer and the insurance carrier paid compensation to the claimant for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks at the rate of $5.66 per week (66-2/3 percent of 25 percent of $34.02) in the amount of $70.35.

9. The sum of $34.02 was incorrectly stated as the average weekly wage of the claimant at the time of the injury.

10. The average weekly wage of the claimant at the time of the injury was $80.00.

11. The date of last payment made by the employer and the insurance carrier for temporary partial disability, as aforesaid, was October 27, 1967.

12. No further claim was filed by the claimant with the Bureau of Employees' Compensation, and the claimant has not filed a claim for additional or further compensation within one year from the date last payment of compensation was made to him by the employer and the insurance carrier herein.

13. Claimant continued to have pain in his right lower abdomen as well as his back. He seeks compensation herein from the employer and the insurance carrier for permanent partial disability from September 2, 1966 to the present time, as well as the payment by the employer and the insurance carrier of all medical treatment and hospital care secured by the claimant as a result of the injury.

CONCLUSIONS

1. The amount of $70.35 paid by the employer and the insurance carrier to the claimant for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks, was incorrect since it was calculated on the basis of claimant's average weekly wage being $32.04. In view of the fact that claimant's average weekly wage at the time of the injury is found to be $80.00, the employer and the insurance carrier should have paid the claimant the sum of $165.67 as compensation for 25 percent temporary partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks at the rate of $13.33 per week (66-2/3 percent of 25 percent of $80.00). Accordingly, it is found that the employer and the insurance carrier are obligated to pay the claimant the amount of $95.32 which is the difference between the compensation due and owing him, $165.67, and the compensation already paid him, $70.35.

2. The medical treatment rendered by the University Hospital, Baltimore, Maryland to claimant on June 9, 1966 was emergency care required as a result of the injury to claimant on June 8, 1966. The claimant sought medical care on June 9, 1966 pursuant to the suggestion and advice of the physician at Northeast Industrial Clinic, Washington, D.C. which he attended at the instance of the employer herein. Moreover, the claimant's injury was misdiagnosed at said clinic. Accordingly, it is found that the employer and the insurance carrier are obligated to pay the cost of medical services rendered by the University Hospital, Baltimore, Maryland to the claimant on June 9, 1966.

3. The medical care and treatment rendered by Dr. Calvin P. Hornstein, chiropractor, to the claimant herein from June 9, 1966 to March 6, 1970 was not authorized or approved by the employer, nor did the claimant request authorization or approval from the employer to secure such care and treatment. Accordingly, and since the employer did not refuse to furnish necessary medical care and treatment, it is concluded that the employer and the insurance carrier are not obligated to pay the cost of medical services rendered by Dr. Calvin P. Hornstein, chiropractor, to claimant between June 9, 1966 and March 6, 1970.

4. Although claimant did file his claim within one year from the date of injury, he did not file a claim within one year from the date of last payment to him by the employer and insurance carrier. It is contended that (a) under the "notice to claimant" form he is instructed to file within one year after the date of injury *or* date of last payment of compensation, (b) that Section 22 of the Act, Title 33, U.S.C. 922, deals with modification of awards, and no such modification is sought here as claimant seeks a permanent injury award not heretofore made.

A claimant is required to file a claim within one year after date of last payment made to him, and he is not relieved of this requirement by having filed a claim within one year after the injury. The use of the disjunctive "or" in the notice to claimants must necessarily refer to the fact that claimant must file within one year of either event *as the case may be.* Section 913(a) provides that the right to compensation is barred unless a claim therefore is filed within one year after the injury. It also states that if payment of compensation has been made without an award on account of such injury, a claim may be filed *within one year after the date of the last payment.*

In *O'Keefe vs. Fidelity & Guaranty Co.* (CA5) 338 F.3d 21 (1964) compensation was paid to a claimant without an award. More than one year later a further claim was made for compensation. The court concluded the right of an employee to additional compensation is governed by Section 922, which provides that upon the application of a party based on changed conditions the Deputy Commissioner may review a compensation case *at any time prior to one year after the date of the last payment of compensation.* Since no claim was made by the employee within the one year period, the court concluded he has no right to claim additional compensation benefits.

It thus becomes clear that when a last payment is made by the insurer, it triggers the one-year limitation period with modification of compensation awards. The fact that payment was made in conformance with the recommendation of the claims examiner, as here, does not alter the fact that a claim must be filed within the one year period to obtain further compensation. *Stracham Shipping Co. v. Hollis* (CA5) 460 F.2d 1108 (1972). In rejecting a claim for additional benefits the court stated:

> "Nowhere in the Act is there any indication of an intent by Congress to permit a claim for compensation to be asserted later than one year after the last payment of compensation".

See also *Maryland Casualty Company v. Britton*, U.S. District Court for District of Columbia, No. 14297 (1942).

Claimant cites *Stancil v. Massey* 436 F.2d 274 (1970) as supporting his right to additional compensation where a claim was filed more than one year after the date of last compensation payment. But that case turned on the fact that the carrier's doctor advised claimant he had a mild back strain and was discharged from treatment. Claimant had, in reality, a herniated disc and the original diagnosis lulled him into "quiescence" since he considered himself not reduced in working power. That case, in my opinion, is distinguishable and does not, as the court says, alter the basic rule requiring the filing of a claim within one year after the date of last payment of compensation.

AWARD AND ORDER

1. The employer, CECO Corporation, and the insurance carrier, General Accident and Fire and Life Assurance, shall pay claimant, Jessie Harris, the amount of $95.32, that being the remaining sum due and owing claimant, not already paid, for 25 percent partial disability from June 8, 1966 to September 2, 1966, inclusive, 12-3/7 weeks, at the rate of $13.33 per week (66-2/3 percent of 25 percent of $80.00).[1]

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[1] Claimant's counsel stated at the hearing he requested counsel fees only if the award for permanent partial disability was granted. Accordingly, no provision is made for counsel fees herein.

2. The employer and the carrier shall pay the cost of the medical treatment required and secured by the claimant at University Hospital, Baltimore, Maryland, on June 9, 1966.

3. IT IS HEREBY ORDERED that the claim for permanent partial disability from September 2, 1966 to the present date be, and the same hereby is, dismissed.

/s/ WILLIAM NAIMARK
Administrative Law Judge

Dated at Washington, D.C.
April 26, 1973

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant, the employer, the attorney for the claimant and the attorney for the respondents at the last known address of each as follows:

NAME	ADDRESS
Jessie Harris	2466 Nevada Street Baltimore, Maryland 21230
Ceco Corporation	% General Accident Fire and Life Assurance 5454 Wisconsin Avenue, N.W. Washington, D.C.
General Accident Fire & Life Assurance	5454 Wisconsin Avenue, N.W. Washington, D.C.
Harvey Rosenberg, Esq.	1001 Spring Street Silver Spring, Maryland 20910

John C. Duncan, III, Esq.
Southern Building
Washington, D.C. 20005

/s/ JACK GARRELL
Deputy Commissioner

Mailed: May 3, 1973

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act CHARLES E. JONES, *Claimant,* v. INTERCOUNTY CONSTRUCTION CORPORATION, *Employer,* HARTFORD ACCIDENT & INDEMNITY COMPANY, *Insurance Carrier.*	**Compensation Order** **Rejection of Claim for Additional Compensation** **Award of Medical Expenses** **Case No. 15144-49**

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. That on July 19, 1960, the claimant above named was in the employ of the employer above named, whose address is 4744 Baltimore Avenue, Hyattsville, Maryland; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled, "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the

said Act was insured by Hartford Accident and Indemnity Company;

2. That on the said day the claimant, while performing services for the employer as a pile driver at a jobsite in the District of Columbia,